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Supreme Court of the United States

Nos. 39 and 40—October Term, 1925.

MARIANNA MATTHEWS,
Plaintiff in Error,

39 vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.
Defendant in Error.

MORTIMER MATTHEWS,
Plaintiff in Error,

40 vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.
Defendant in Error.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

Petition for Rehearing

MORTIMER MATTHEWS,
Counsel for Marianna Matthews, Plaintiff in Error.
And Pro Se.

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The Plaintiffs in Error respectfully and with a deference, which is to be understood throughout, without tiresome repetition, pray the Court for a re-hearing, upon the ground of two fundamental misconceptions of the record, and of the law of Ohio, as applicable thereto, shown by the opinion of November 30, 1925, in these cases.

1. This court has said in its opinion (Advance sheets, page 3):

> "We think, however, that in these cases *Norfolk & Suburban Turnpike Company* v. *Commonwealth of Virginia*, 225 U. S. 264, and *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 364, (366), as in the *Hetrick case*, on the face of the record the State Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable."

And this court has held that our cases are to be governed accordingly.

Our fundamental proposition, upon this part of our petition is this: However this court may decide in cases from other states, it remains, nevertheless, under its invariable rule of decision, long established, that where the Supreme Court of a state has rendered a decision construing the statutes or constitution of the state, that decision will be accepted as final by this court, as the law of that state, that, it is clearly bound to hold, that a dismissal by the Supreme Court of Ohio, on the ground that the record contains no *debatable* constitutional question, is a dismissal for want of jurisdiction; and that it is not, either concurrently, or at all, a decision upon the merits. This is for the reason, (1) that the Supreme Court of Ohio, by a long course of practice, unequivocally *understands itself* so to be doing, and must be held to have so decided, and for the further reason, (2) that this must *necessarily be so*, because a decision upon the merits would be to entertain jurisdiction, and would be to hold that the case

was rightly in court, and would require the court to decide other questions, not constitutional, arising on the record. It, therefore, could not dismiss the petition, *solely* for the want of a debatable constitutional question, but could do nothing other than affirm, or reverse, or might dismiss for that reason, and for the *additional* express reason, either that no other questions were raised by the record, or, *perhaps,* that the latter were equally frivolous, or not debatable. To infer that when that court dismisses on the sole ground that there is no debatable constitutional question raised, it is dismissing the cause upon the merits, is to assume that it is doing an unlawful act, which of course is not a permissible assumption.

That this is the interpretation of the Constitution of Ohio, as determined by its Supreme Court, we need only refer to *Chicago Ornamental Iron Co.* v. *Rook,* 93 Ohio St., 152. This case was taken to that court as of right upon a constitutional question. While the court held that the case was properly there on that account, it nevertheless disposed of the case upon *another question* arising on the record, and affirmed the judgment below. So, in the cases of *Matthews* v. *Huwe* and *Hetrick* v. *Village of Lindsey,* 265 U. S., 384, the records presented questions other than those which were constitutional. The Supreme Court of Ohio nevertheless dismissed all, the former two because no "debatable" constitutional question was raised, the latter because the statutes in question had so long been held constitutional, "that their constitutionality could no longer be questioned." They were all dismissals for want of jurisdiction; otherwise the cases were properly in the Supreme Court of Ohio, which would necessarily have felt bound to pass upon the other questions, and have

either affirmed, or reversed, or at least dismissed upon an additional express ground that they too were not debatable.

In the index to Vol. 109 of the Ohio State Reports, at page 694 under the heading of "Jurisdiction—Supreme Court—Dismissals—No Constitutional Questions Involved, appears the following. See *Matthews* v. *Huwe,* 628; *Dix* v. *Shoemaker,* 629; *Krug* v. *Roberts,* 630; *Gehring* v. *Shuster Co.,* 631; *Brick & Tile Co.* v. *Trust Co.,* 633; *Ossage* v. *Foley,* 635; *Rickey* v. *Baughman,* 638; *Doud* v. *Cincinnati,* 639."

In only one of these cases, *Dix* v. *Shoemaker,* is the word "debatable" absent, yet all are under the same head-note, *"No constitutional question involved,"* and as we have seen, are in that way indexed. Upon a rehearing, if granted, we desire to cite innumerable cases reported at the ends of the last ten or twelve volumes of the Ohio State Reports, to the same effect. Only a very few of these omit the word "debatable;" yet all have the same head-note and are indexed alike. The cases above in 109 Ohio State Reports are typical.

Seba H. Miller, at that time, "Of the office of the clerk of the Supreme Court (of Ohio) and member of the Springfield Bar," and now the clerk of that court, in 1922, published a manual entitled "The Law and Practice in Error Proceedings and in Original Actions in the Supreme Court of Ohio, with Forms" etc. At Sec. 117 (page 106) of this manual, the author says:

> "Sec. 117. Constitutional question must be debatable. Cases have been filed in which many alleged constitutional questions were presented, apparently with the hope that perhaps some merit might later on be found in one of them. The allegation of the violation of numer-

> ous rights guaranteed by the constitutions of the United States and the State of Ohio does not confer jurisdiction upon the Supreme Court to hear the case. The question must be involved in the case, *and it must be debatable*, or it is not a constitutional question within the meaning of Article IV Section 2 of the Constitution."

In addition to the necessity, that it must in the nature of things be so, we find the Reporter of the Ohio Supreme Court and its clerk's office taking the view maintained by us, and the court itself acquiescing in these public utterances, and continuing in its same course without comment. In fact, the Supreme Court of Ohio derived these views from *this* court, for Mr. Miller very aptly cites in support of them upon his next page 107, *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company*, 228 U. S., 596, and *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308. We have reason to think the Supreme Court of Ohio will be as much surprised at the source, as by the fact, of the decision, that it did not dismiss the present cases for want of jurisdiction.

This Court continues on page 3 of its opinion, immediately after what we have quoted at page 2 above:

> "It is one of those not in frequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider."

This is only partly correct, and then only in cases

where the constitutional question, upon which jurisdiction depends, is also the identical question upon which the merits depend. It might be made to apply to our cases in *this* court, but not in the Supreme Court of Ohio. This was pointed out in *Equitable Life Assurance Company* v. *Brown, supra,* where the motion was to dismiss *or* affirm, and this court preferred to grant the former, rather than the latter, simply because it was first in order. The implication however is strong, in fact conclusive, that dismissal because the question was *frivolous* was to deny jurisdiction, and that the only way to entertain jurisdiction, and then dispose of the case upon the same ground, was to grant the motion to affirm. What the court now says is a misapplication of what Mr. Justice White said at pages 314-315 of that case.

In *Milheim* v. *Moffat Tunnel District,* 262 U. S., 710, this court very recently took the same view. Here also there was a motion to dismiss *or* affirm. The court decided that a federal question which requires analysis, and exposition for its decision is *not frivolous* and withstands a motion to dismiss the writ of error, p. 716; but a motion to affirm should be granted if the questions on which decision depends are so wanting in substance as not to need *further* argument p. 717. The holding of the Supreme Court of Ohio, that the questions were not debatable at all, not only foreclosed any thing that could be termed "*further argument,*" but also "analysis and exposition," for certainly these are debate.

Coming now, to a consideration of the jurisdiction of this court, so far as it is analogous in principle, to that of the Supreme Court of Ohio, we find, in *Sugarman* v. *United States,* 249 U. S., 182, where this court dismissed a writ of error to a District Court of the

United States, on the ground that it did not present a *substantial* constitutional question, that the court said (p. 185): "As no substantial constitutional question was presented by the defendant, this court is without jurisdiction to review the *other errors* assigned." If anything the phrase "not debatable" is stronger to show lack of jurisdiction than the phrase "not substantial," for the latter it is conceivable, might require "analysis and exposition," while the former, by its very terms, would not.

And so, in *Zucht* v. *King*, 260 U. S. 174, the same use is made of the phrase "substantial." Here too this court disposed of *another* question upon the record, by saying (177): "Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari."

The doctrine of all these cases in this court, is, that, a finding of *frivolty* or lack of *substantiality* accompanied by dismissal, is a dismissal for want of jurisdiction. To be otherwise, it would have to be followed by an affirmance of the judgment below.

In view of all these cases, *Hetrick* v. *Village of Lindsey, supra,* is as inadvertently a departure from the settled doctrine of this court, as the first ground, upon which the present cases are decided.

We come now to the second, or alternative ground on which the decision of these cases is based.

2. This Court finally says in its opinion (Adv. Sheets 3):

> "Another reason why the motion (writ of error) must be dismissed, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for

> review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

The first of these quoted sentences may or may not be sound, according as the court may think it does not, or does depend upon the second sentence, upon considering what we have to urge a little hereafter. The second sentence however is based upon a *fundamental misunderstanding* of what the record contains and of the law of Ohio, which is applicable.

The judgment of the court of appeals was entered April 25th, 1923 (Record page 26). The entry of dismissal by the Supreme Court of Ohio was entered in the Court of Appeals December 27, 1923, (Record 12).

The constitution of the State of Ohio, Article IV, Section 2, provides first, that the Supreme Court of Ohio shall have "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state" and again, that "in cases of public or great general interest the Supreme Court may *within such limitation of time as may be prescribed by law,* direct any Court of Appeals to certify its record to the Supreme Court, and may review or affirm, modify or reverse, the judgment of the Court of Appeals."

In *Akron* v. *Roth*, 88 Ohio St., 456, the Supreme Court itself prescribed a limitation of seventy days, within which application can be made for an order to certify on the ground of "general or great public interest."

It is of the utmost importance, to observe that this

limitation of seventy days is not an ordinary statute of limitations, but a conditional limitation of the jurisdiction conferred.

At the time the Supreme Court of Ohio dismissed the petitions in error on the ground that the records involved no debatable constitutional questions, the time had long since expired, within which it had power to direct certification on the ground of "public or great general interest." After seventy days from April 25, 1923, that court had no such power; but it was not until December 27, 1923 that *it became, by mandate of the Supreme Court of Ohio, the law of these cases,* that the Court of Appeals was the highest court, in which a decision *in these cases* could be had. It did become so at that time, for at that time the Supreme Court of Ohio had no power to order certification, even if application had been made. This mandate was the cause, by which alone finality can be attributed to these judgments of the Court of Appeals. Our contention, therefore, that its judgments were final judgments, "susceptible of being here reviewed by writ of error," *do not* "rest upon the impossible assumption," that their finality "existed before the happening of the cause, by which alone finality could be attributed to them." These judgments thus susceptible of being reviewed here were *not "open at the same time* to the power" of the Suprem Court of Ohio to review and modify. It is *thus* we distinguish or apply *Andrews* v. *Virginian Railway Co.,* 248 U. S., 272.

To sum up what we have to say in this connection, the Supreme Court of Ohio, without contribution on our part, made these judgments, for the first time, final, so far as this court is concerned, long after the former court's power under the Ohio constitution to order

certification had expired. It would seem to follow, that these are "final judgments or decrees in a suit in the highest court of a state in which a decision in the suit could be had."

If these considerations are sound, they also distinguish *Stratton* v. *Stratton*, 239 U. S., 55, wherein there was no petition in error as of right at all, *a fortiore* none dismissed long after the expiration of the constitutional power to order certification. The case has no application.

We present our petition for a rehearing, conscious of the fact, that what we have said, somewhat closely impinges upon a re-argument, which has not as yet been granted. We have not known, however, how else to challenge the attention of the Justices of the court, than by, as briefly and distinctly as possible, indicating the kind and force of the re-argument, which can be made, if this petition is granted.

We respectfully pray that the petition be granted.

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error.
And Pro Se.

CERTIFICATE OF COUNSEL.

It is hereby certified, this 4th day of January, 1926, by counsel for the Plaintiffs in Error, that the foregoing Petition for a Re-hearing is presented in good faith and not for delay.

MORTIMER MATTHEWS,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASES.

These two causes come into this Court on writs of error, sued out on the same grounds, seeking review and modification of judgments of the Court of Appeals of Hamilton County, Ohio, for the First Judicial District of that state.

These judgments were entered on the twenty-fifth day of April, 1923.

The plaintiffs filed a petition in error as of right in the Supreme Court of Ohio, which proceedings were dismissed by the Supreme Court of Ohio on the 4th day of December, 1923, on the ground that the records did not present any debatable constitutional question.

(Record 297, page 12; Record 298, page 7; Matthews vs. Huwe, 109 Oh. St. 628.)

The proceedings in the Court of Appeals of Ohio were on appeal by the plaintiffs from adverse judgments of the Court of Common Pleas.

The plaintiffs sought injunctions against the collection by the defendant of certain assessments upon one tract of land owned by Marianna Matthews and upon five other tracts of land owned by Mortimer Matthews, which assessments were levied against said property by the Commissioners of Hamilton County, under Section 1214 of the General Code of the State of Ohio, for the improvement of Section X of the Glendale and Milford Road, being Inter-County Highway No. 46, Section X.

Section 1214 of the General Code of Ohio is in the words and figures following:

> "Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the improvement. Fifteen per cent of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the townships

in which such road is located. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purpose of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent to be special-

ly assessed and to change the assessment area where the improvement is made on their application. The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed, which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported, the commissioners or trustees shall publish once each week for two consecutive weks in some newspaper published in the county and of general circulation in the township where the improvement is located, notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections, he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed, the county commissioners or township trustees shall hear the same and act as an equalizing board and they

may change said assessments if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assessments as reported by the surveyor or modified by them. Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith. (107 Ohio Laws, 129, 130.)"

ARGUMENT ON JURISDICTION

It is contended the present proceedings are erroneous in that an effort is here made to have the judgment of an intermediate Court—the Court of Appeals—reviewed, rather than the judgment of the highest Court of the State—the Supreme Court of Ohio.

On Page 7 of the Transcript of Record is to be found the following entry of the Supreme Court of Ohio:

"1923, Dec. 27 (Nov. Term)—Minute 52, certified copy from Supreme Court dismissing petition in error at the costs of plaintiff in error.

"This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right, and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed.

It is further ordered that defendant in

error recover from the plaintiff in error his costs herein expended, taxed at $....."

This entry establishes that the Supreme Court of Ohio assumed jurisdiction of the cause and determined that no debatable constitutional questions were involved. In the face of this judgment by the Supreme Court of Ohio in these causes, the plaintiffs in error, prosecute error here not from the Supreme Court of the State, the highest court in which a decision in the suit could be had, but from the judgment of the Court of Appeals of the First District of Ohio—an intermediate Court.

We submit that the proper foundation has not been laid for a review of these causes by this Honorable Court.

Stratton vs. Stratton, 239 U. S. Reports, page 55.

Andrews, Admx. of Andrews vs. Virginia Railway Company, 248 U. S. Reports, page 272.

ARGUMENT ON MERITS

Plaintiffs entire assignment of errors is predicated upon the fact that the County Commissioners in their resolution of May 11, 1920 (Page 82 of the Record) suggested a plan of arriving at a tentative apportionment of the assessments.

The County Surveyor by the provisions of Section 1214 is the official to prepare the estimated assessment roll and the record discloses that on June 11, 1920, the County Surveyor pre-

sented and filed the estimated assessments with the Commissioners. (Page 87 of the Record.)

Notice of the filing of the estimated assessment roll was duly published as required by Section 1214 General Code of Ohio (Record pages 88 and 89) and a public hearing held, follow which the Commissioners adopted the assessments by their resolution of July 9, 1920 (Page 90 of the Record) reciting

> "Whereas such apportionment is according to the benefits which will result in said real estate" and
>
> "Whereas, no valid objections have been filed to said assessment."

We think it clear that the three-way plan of apportioning the assessments was a suggestion merely and we have no hesitancy in endorsing its value because it covers and embraces properly all the elements that enter into a just and equitable apportionment of special benefits.

However, if as plaintiff in error contends, the commissioners had no legal right to suggest a method of apportionment, they by attempting so to do, exceeding their authority and so much of their suggestion as relates to the method of preparing the estimated assessment roll, is of no legal effect.

In the instant case, no objections were filed in writing as is provided by Section 1214 of the General Code.

"That the legislative power of the state may authorize special assessments for special road improvements and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion is, under the decisions, no longer an open question."

Mattingly vs. District of Columbia, 97 U. S. 687, 692 and

French vs. Barber Asphalt Paving Company, 181 U. S. page 324.

In conclusion, we respectfully urge that the assessments made against the plaintiffs in Error property are not repugnant to the due process clause of the Fourteenth Amendment.

CHAS. S. BELL,
Prosecuting Attorney,
Hamilton County, Ohio.

CHESTER S. DURR,
Asst. Prosecuting Attorney,
Hamilton County, Ohio.